IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KOOME, MWERA, MUSINGA, OUKO & MOHAMMED JJ.A)

CIVIL APPEAL NO. 281 OF 2012

BETWEEN

SHABAN MOHAMUD HASSAN ….... 1ST APPELLANT

HUSSEIN MOHAMMED ABDIRAHMAN ….... 2ND APPELLANT

AHMED SHEIKH TAWANE & 700 OTHERS ….... 3RD APPELLANT

AND

THE ATTORNEY GENERAL ….... 1ST RESPONDENT

THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION..... 2ND RESPONDENT

MUYHIDIN ABDIRAHMAN M. ALI ….... 3RD RESPONDENT

OSMAN IBRAHIM MOHAMMED ….... 4TH RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Nairobi (Mohammed Warsame, Ruth Sitati, Hellen Omondi, Pauline Nyamweya & David Majanja JJ) dated 9th July, 2012

in

HIGH COURT JUDICIAL REVIEW NO. 94 OF 2012

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JUDGMENT OF THE COURT

On 13th December, 2012, this Court (E.M. Githinji, Wanjiru Karanja and D.K. Maraga JJ.A) directed that this appeal and Civil Appeal No. 307 of 2012, **Ex-Chief Peter Odoyo Oganda & 9 others V. Independent Electoral and Boundaries Commission and 14 others,** Civil Appeal No. 307 of 2012 be heard one after the other.

Pursuant to those directions, the two appeals were so heard and judgment in No. 307 of 2012 was rendered on 19th April 2013. However, due to some mix-up with the two files, judgment in this appeal has been delayed to this date, for which delay we apologize to the parties and counsel.

Following the publication by the Independent Electoral & Boundaries Commission (IEBC) of Legal Notice No. 14 of 6th March 2012, The National Assembly Constituencies and County Assembly Wards Order, 2012, on the delimitation of boundaries for constituencies and assembly wards, several complaints were raised regarding the manner in which the 80 constituencies and 1450 county assembly wards were created, distributed, renamed and boundaries established. As a result, some 132 applications, in the form of petitions under **Article 22** of the Constitution and Judicial Review under **Order 53** of the Civil Procedure Rules were filed in the High Court. A five-judge bench of **Warsame J,** *as he then was,* **Sitati, Omondi, Nyamweya** and **Majanja**, **JJ** was constituted by the Chief Justice pursuant to the provisions of **Article 165 (4)** of the Constitution, to hear those applications. In view of their sheer numbers, all the petitions were consolidated under Nairobi H.C. No. Petition No. 91 of 2012 and Judicial Review applications under Nairobi H.C. JR Misc. Application No. 94 of 2012. In the latter were two Judicial Review applications that concern this appeal, namely H. C. JR Misc. Application Nos. 114 and 116 of 2012. The two applications relate to the delimitation of wards in Mandera East and Lafey Constituencies. The applicants in H.C. JR Misc. Application No. 114/2012 sought, *inter alia:*

a) an order of mandamus to compel the IEBC to delimit the Arabia & Libelia county assembly wards as falling within Lafey Constituency, and

b) an order of mandamus to compel the IEBC to reinstate the current civil wards of Gadudiye, Khalalio, Bella, Karow, Garba Qoley & Hareri Hosle as county assembly wards within Mandera East Constituency.

The applicants in H.C. JR Misc. No. 116/2012, on the other hand sought,

a) that an order of prohibition be issued to stop the IEBC from conducting elections in Mandera East and Lafey constituencies or giving effect to the two constituencies under legal Notice No. 14 of 2012 contrary to the views expressed to the IEBC by the applicants in a memorandum dated 14th February 2012 and at the public hearings in Mandera Town.

b) that an order of certiorari to issue to quash the IEBC's decision contained in legal notice No. 14 of 2012 creating and delimiting the Mandera East and Lafey Constituencies.

c) that the IEBC be compelled by an order of mandamus to recognize and accept the applicants' boundaries delimitation of Mandera East and Lafey Constituencies and to delimit the Mandera East and Lafey Constituencies Wards as proposed in the applicants application.

The learned judges of the High Court framed the issues raised in all the applications comprised in H.C. Nbi JR Misc. Application No. 94 of 2012 as follows:-

"a) Whether or not under Article 89 of the Constitution of Kenya, judicial review is the proper mode of review of the decision of the IEBC published as the National Assembly Constituencies and County Assembly Wards Order, 2012 (Legal Notice No. 14 of 2012)

b) Whether or not the said Order is amenable to the judicial review orders of Certiorari, Mandamus and Prohibition as prayed and if so on what grounds may the same issue and how would the orders be framed"

c) Did the IEBC make the decision in accordance with the Article 89 of the Constitution"

d) What is the scope of this Honourable Court's power and jurisdiction under Article 89 of the Constitution and what reliefs are available in respect of the cases before the court as regards the said report"

e) Whether or not the said decision is wholly or partly invalid and a nullity in any respect or at all on any of the following grounds for being inconsistent with the Constitution of Kenya, and if so whether such invalidity or nullity may be severed and to what extent"

i) The said Legal Notice states that it takes effect from 7th March 2012 whereas Article 89 (9) states that it shall come into effect on the dissolution of Parliament first following its publication by the IEBC in the Gazette;

ii) The IEBC reached its decision without consulting all interested parties under Article 89 (7) (a) as read with Section 26 of the IEBC Act.

iii) The IEBC Act has not published details of constituencies and ward boundaries under Article 89 (9) as read with Section 39 of the Survey Act (Chapter 299) of the Laws of Kenya)

f. Whether or not the said decision is invalid for being inconsistent with Sections 39 and 41 of the Survey Act (Chapter 229 of the Laws of Kenya) as read with Section 31(b) of the Interpretation and General Provisions Act (Chapter 2 of the Laws of Kenya.)

g. Whether or not the IEBC has gerrymandered in the determination of boundaries of wards and constituencies the subject hereof and if so, in what manner.

h. Whether or not the IEBC is guilty of capricious disregard of the will of the people of Kenya and has willfully and deliberately disregarded competent testimony and relevant evidence which a person of ordinary intelligence could not have possibly disregarded and in doing so has come to a wrong determination under Article 89 as read with the Fifth Schedule to the IEBC Act.

i. Whether or not the said decision contravenes Article 47 or the rules of natural justice, is illegal and founded on unfair administrative action including procedural unfairness.

j. Whether or not the said decision failed to take into account the constitutionally prescribed criteria and principles for the delimitation of boundaries of constituencies and wards, to wit, population quota, geographical features, community of interest, historical, economic and cultural ties of the people and means of communication.

k. **Whether or not the said decision is compatible with Articles 10, 19, 20, 38, 40, 56, 174 and 259 (1).**

l. What is the constitutional validity of the said decision and has it been made in accordance with the prescribed constitutional guidelines and the IEBC Act including Section 29 thereof.

m. Whether or not the report is *ultra vires* the powers of the IEBC and if so, to what extent.

n. What is the Attorney General's responsibility in the said decision taking into account Article 156 and Section 29 of the IEBC Act"

o. What should be the order as to costs."

The learned judges further condensed those issues into only two, namely:-

a) *The jurisdiction and the powers of court in relation to* d*elimitation and in particular the meaning and effect of review as envisaged by Article 89 (11).*

b) The criteria for delimitation under Article 89 and application of these criteria in light of the provisions of the Constitution and the IEBC Act.

In answering the first issue, the court found that under **Article 165** the High Court can determine, among other things, whether anything said or done under the Constitution or any law is inconsistent with, or in contravention of the Constitution; and that the High Court has supervisory jurisdiction over subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function. In relation to the dispute before them and on the question of their jurisdiction with regard to boundary delimitation, the judges held that both **Article 89** of the Constitution and **Section 4** of the Fifth Schedule to the IEBC Act vest in the High Court the power to review any decision made by the IEBC. They concluded in this regard that:-

".....the jurisdiction of the High Court to review the boundary delimitation process is not granted by statute but is founded in the Constitution; it is the jurisdiction of the High Court to satisfy itself of the propriety of any act or decision done (sic) **by any person or body pursuant to the Constitution and the law. The High Court sits at the apex of the delimitation process and makes the penultimate decision as to the legality of the decision of the IEBC after hearing the applications for review brought under Article 89 (11)."**

Having satisfied themselves as to the scope of their jurisdiction, the judges proceeded to determine the issues they had framed and stated that in exercise of its powers to review the decision of the IEBC with regard to delimitation, orders issued by the High Court are final and conclusive in nature. The Judges observed, correctly, in our view, that the IEBC is required by law to take the following factors into consideration in the delimitation process:

a) the population density,

b) the means of communication,

c) geographical features and

d) community of interest.

In their view and with reference to the two constituencies in question, the judges came to the ultimate conclusion that the IEBC, in contravention of **Article 89 (5),** failed to take into account the interests of the minority "*corner tribes"* in the delimitation of Mandera East & Lafey constituencies. In order to address the rights of these minority groups the court ordered:-

“a) That Libehia County Assembly Ward in Mandera East Constituency be moved to the proposed Lafey Constituency to be merged with Sala County Assembly Ward to form the new Libehia County Assembly Ward.

b) The new Libehia County Assembly Ward shall comprise the following sub-locations; Sala, Libehia/Kuradeer, Gumbisu, Hareri and Aresa with a population of 45,377.

c) Lafey Constituency shall comprise the following County Assembly Wards; Libehia, Fino, Lafey, Waranqara and Alango Gof with a population of 149,425.

d) We decline the prayer to move the proposed Arabia ward to Lafey. Consequently, the said ward will remain in Mandera East Constituency.

e) That there be created a new County Assembly Ward in Mandera East Constituency named Bulla Mpya comprising the following sub-locations; Bulla Mpya, Kamor, Bokolo/Barwako, Hareri Hosley/Bida/Kamor Elle and Shaf Shafey to provide for the minority corner tribes with a population of 39,537.

f) That there be created a new Neboi County Assembly Ward in Mandera East Constituency comprising the following sub-locations; Neboi, Bur Abor/Sharif and Bula Haji/Figho with a population of 15,039.

g) That there be created a new Khalalio County Assembly Ward in Mandera East Constituency comprising the following sub-locations; Khalalio, Gududiye, Bella, Gingo, Karo and Garba Qoley with a population of 11,081.

h) Township County Assembly Ward of Mandera East Constituency shall comprise the following sub-locations, Township, Central, Bulla Nguvu/Bulla Jamhuria/Bulla Power and Border Point One with a population of 45,358.

i) Mandera East Constituency will now comprise the following County Assembly Wards; Arabia, Khalalio, Neboi, Township and Bulla Mpya with a population of 139,262.

j) Legal Notice Number 14 of 2012 be and is hereby amended to this extent.

k) The maps of Mandera East and Lafey Constituencies be altered and amended to reflect the above changes and positions.

l) There is no order as to costs.”

This decision aggrieved the appellants, who have brought this appeal on the following condensed grounds:-

i) *that the High Court granted reliefs not pleaded.*

*ii) that in doing so the court exceeded its jurisdiction under Article **89** of the Constitution by purporting to redraw the boundaries.*

iii) that the court disregarded the views & proposals submitted by the residents of the two constituencies to the IIBRC and IEBC.

iv) that the court declined to grant the appellants an opportunity to be heard in the application.

These grounds were argued by Mr. Sagana for the 1st & 2nd applicants and supported by Mr. Issa for the 3rd applicant. Both were unanimous that, without the necessary expertise the High Court purported to redraw the boundaries the subject of this appeal, a role reserved by law to the IEBC; that the power of the High Court was limited to correction of errors and omissions committed by the IEBC. Counsel also submitted that while advocates representing certain parties were allowed by the court to highlight their written submissions, no such opportunity was extended to the appellants' counsel. Ms. Munyi, learned counsel for Attorney General, urged us to consider that no useful purpose will be served in granting the orders sought in the appeal as the general elections were only 17 days away and that if there is need to adjust the boundaries in contention that can await the next delimitation exercise. Learned counsel for the IEBC, Messrs Nyamodi and Murungi advocates reiterated those same sentiments as Ms Munyi.

Mr. Kibe Mungai representing the 3rd and 4th respondents and Mr. Kinyanjui for the interested parties in HC JR Misc. Appl. No. 116 of 2012, opposed the appeal and submitted that the High Court properly found that the IEBC had failed to comply with the law in the delimitation of the boundaries affecting the two constituencies under review; that the delimitation by the court was, by and large, based on the prayers sought in H.C. Misc. Civil Appl. No. 116/2012. Mr. Kinyanjui further submitted that the Notice of Appeal was incompetent as it only relates to H.C Misc. Civil Appl. No. 114 of 2012; and not No. 116 of 2012; that the two applications having been consolidated with others, the appeal ought to have been brought against the decision in H.C. Misc. Civil Appl. No. 94 of 2012, under which the applications for judicial review were consolidated, heard and determined. Mr. Mungai on the other hand urged us to find that the *"review"* envisaged under **Article 89** is not the usual judicial review provided for under **Section 8 (2)** of the Law Reform Act and **Order 53** of the Civil Procedure Rules; that it is a review intended to correct political decisions hence the strictures in the normal judicial review applications are not applicable; that in considering such application the court was in order to question not only the process but also the merit of the impugned decision.

Indeed, that is the broad issue raised in this appeal as it was in the High Court and that is where we start our consideration of the appeal. As the dispute arises from the interpretation of **Article 89** of the Constitution, we find it necessary to reproduce the entire provision.

"89. (1) There shall be two hundred and ninety constituencies for the purposes of the election of the members of the National Assembly provided for in Article 97 (1) (a).

(2) The Independent Electoral and Boundaries Commission shall review the names and boundaries of constituencies at intervals of not less than eight years, and not more than twelve years, but any review shall be completed at least twelve months before a general election of members of Parliament.

(3) The Commission shall review the number, names and boundaries of wards periodically.

(4) If a general election is to be held within twelve months after the completion of a review by the Commission, the new boundaries shall not take effect for purposes of that election.

(5) The boundaries of each constituency shall be such that the number of inhabitants in the constituency is, as nearly as possible, equal to the population quota,but the number of inhabitants of a constituency may be greater or lesser than the population quota in the manner mentioned in clause (6) to take account of—

(a) geographical features and urban centres;

(b) community of interest, historical, economic and cultural ties; and

(c) means of communication.

(6) The number of inhabitants of a constituency or ward may be greater or lesser than the population quota by a margin of not more than—

(a) forty per cent for cities and sparsely populated areas; and

(b) thirty per cent for the other areas.

(7) In reviewing constituency and ward boundaries the Commission shall––

(a) consult all interested parties; and

(b) progressively work towards ensuring that the number of inhabitants in each constituency and ward is, as nearly as possible, equal to the population quota.

(8) If necessary, the Commission shall alter the names and boundaries of constituencies, and the number, names and boundaries of wards.

(9) Subject to clauses (1), (2), (3) and (4), the names and details of the boundaries of constituencies and wards determined by the Commission shall be published in the Gazette, and shall come into effect on the dissolution of Parliament first following their publication.

(10) A person may apply to the High Court for review of a decision of the Commission made under this Article.

(11) An application for the review of a decision made under this Article shall be filed within thirty days of the publication of the decision in the *Gazette* and shall be heard and determined within three months of the date on which it is filed.

(12) For the purposes of this Article, "population quota" means the number obtained by dividing the number of inhabitants of Kenya by the number of constituencies or wards, as applicable, into which Kenya is divided under this Article." *(Underlining ours).*

According to the learned judges of the High Court, the word *"review*" as used in **sub Articles 2, 3 and 4** (underlined) above in relation to the role of the IEBC bears the same meaning in regard to the role of the High Court in **sub Article 10.** This is how **t**hey understood their role in so far as **Article 89 (10)** is concerned:-

"The review contemplated in Article 89 (11) is a review of the procedures and merits of the delimitation exercise. Where an application is made to court the court assumes all the plenary powers necessary to ensure that IEBC has complied with the Constitution. The South African Constitutional Court defined the constitutional duty of the court in the case of Minister of Health and others V. Treatment Action Campaign and others [2002] 5 LRC 216, 248 at paragraph 99, where it stated;

The primary duty of courts is to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice.

"The Constitution requires the State to respect, protect, promote, and fulfill the rights in the Bill of Rights. Where State policy is challenged as inconsistent with the Constitution, courts have to consider whether in formulating and implementing such policy the State has given effect to its constitutional obligations. If it should hold any given case that the State has failed to do so, it is obliged by the Constitution to say so. In so far as that constitutes an intrusion into the dormain of the Executive, that is an intrusion mandated by the Constitution itself..... It is on the basis of these sentiments that we must dismiss the argument made on behalf of the IEBC that the Court is not suited to determine matters concerning delimitation or limit the nature of relief that can be issued. It is true that the Court may lack the technical expertise of cartographers, statisticians, anthropologists and any other technical capacity to carry out the task of delimitation but this argument cannot stand in the way of the court in performing its constitutional obligation. The court has full power to call or summon any witnesses, expert or otherwise, call for and examine all or any documents and material in the power or possession of the IEBC and do all things necessary to ensure that the Constitution is complied with." *(Emphasis supplied).*

We reiterate that in establishing the boundaries of constituencies, the IEBC was required to ensure that the number of inhabitants in the constituency is, as nearly as possible, equal to the population quota and must take into account:-

a) the geographical features and urban centres,

b) community of interest, historical, economic and cultural ties, and

c) means of communication.

The IEBC is further required to consult all interested parties and to progressively work towards ensuring that the number of inhabitants in each constituency and ward is, as nearly as possible, equal to the population quota.

With regard to the population quota, the High Court found that the IEBC acted within the law and the Constitution in using a formula based on the provisions of **Article 89 (12)** aforesaid, namely, *"The Total Population of Kenya divided by total number of constituencies*". The national population of 38, 610, 097 applied by the IEBC in this formula was based on the August 2010 Kenya Population and Housing Census Report. Regarding the criteria of geographical features, community of interest, historical economic and cultural ties, the High Court was of the view that the IEBC adopted a narrow and restrictive interpretation of these factors and instead relied on foreign jurisprudence to define them. Indeed, this was the most highly contested aspect of the delimitation process. The IEBC was accused of ignoring the rights to fair representation and equality of the minority and marginalized communities. On public participation, the court was satisfied that to the extent possible the IEBC did provide a form for public participation.

For our part, we are satisfied that all the factors the IEBC was required by the Constitution and statute to take into account in establishing the boundaries of the two constituencies, the subject of this appeal, were considered, except one aspect. On 16th January 2012 a memorandum was prepared for the IEBC by a group calling itself *"Minority Residents of Mandera,"* otherwise referred to as the *"Corner Tribes*." The memorandum was in respect of the proposed division of Mandera East Constituency into

Mandera East and Lafey constituencies. This area is inhabited by 4 communities, the Garret, Murraleh, Degodia and the "*Corner Tribes,"* with the latter comprising several small tribes. The concern of the *"corner tribes"* in the memorandum was that whereas the other 3 communities in the area have had representation at parliamentary level, they ("*the corner tribes"* have never had such an opportunity. Instead, in the delimitation exercise, the IEBC has added the Garret community an additional constituency to the existing one, giving them a total of 3 constituencies, created one constituency in addition to an existing one to the Murraleh Community and created a new constituency to the Dagodia. The *"corner tribes"* did not get even a single constituency, yet, according to them, they were the most deserving.

In our view, there is considerable merit in the above submissions presented to the IEBC which it ought to have taken into account in delimiting the boundaries of the two constituencies. We note from the record that the *"corner tribes"* have suffered past discrimination as they were considered freed slaves of the main tribes. They are referred to in Mandera District Political Record Book relied on in the High Court as *"adone"* a Somali word for a slave. It was therefore within the rights of the effected parties to move to the High Court pursuant to **Article 89 (10)**:-

".....for review of the decision of the commission....."

We have been urged to find that the "*review"* contemplated in the foregoing provision went beyond judicial review as we know it. The High Court was persuaded by this argument and went ahead to itself redesign the boundaries in question as shown earlier in this judgment. While we find no fault in the High Court's finding that, the IEBC failed to take into account the interests of the *"corner tribes",* as required by **Article 89 (5)** of the Constitution, we think the learned Judges exceeded their jurisdiction in redrawing the boundaries even after appreciating in their judgment that that was the primary duty of the IEBC, imposed by the Constitution and that they lacked the technical expertise to undertake the task of boundary delimitation. The learned judges confirmed their role in the delimitation process as follows:-

"It is not the court's duty to substitute the decision of IEBC with its own views but to use the constitutional yardstick to evaluate the process and final decision of the IEBC and to declare and hold unconstitutional any decision or part thereof that does not comply with the Constitution ..... The delimitation process is necessarily complex and the commissions are required to consider a myriad of factors. Balancing these factors within the limits of the law and the Constitution is the duty cast on the IEBC and the court will respect the choices made if those choices accord with the Constitution and the law."

That indeed is the law. The Constitution for the first time by dint of **Article 165** now expressly vests in the High Court the power to grant an order of judicial review which it (the High Court) hitherto drew from **Section 8 (2)** of the Law Reform Act and **Order 53** of the Civil Procedure Rules. We do not accept the argument that the High Court was exercising powers beyond the well-known strictures and considerations in applications for judicial review. As a matter of fact, both H.C. J.R Misc. Application Nos. 114 and 116 of 2012 were expressly brought pursuant to the provisions of **Order 53 Rules 3, 4, 5, 6 & 7** of the Civil Procedure Rules, and specifically sought orders of *certiorari, mandamus* and prohibition.

The jurisdiction of the High Court after finding that there was violation of the Constitution was restricted to quashing by an order of *certiorari* the impugned decision of the IEBC, restrain it (the IEBC) by an order of prohibition from conducting elections in the two constituencies on the basis of the contested delimitation exercise, and to direct it by *mandamus* to conduct fresh delimitation taking into account the grounds raised in the judgment. Having elected to come by judicial review and not a petition

under the Constitution, the applicants in the two applications were bound by the rules applicable in judicial review applications. See **Republic V. The Kenya National Examination Council *exparte* Geoffrey Githinji & Others** C.A. 266 of 1996. This Court has, time without number emphasized that the procedure of judicial review only applies to the decision-making process, not the merit of the decision. See **Akaba Investment Ltd V. Kenya Ports Authority,** Civil Appl. No. 255 of 2003. The scope of judicial review was considered in **Republic V. Vice Chancellor, Jomo Kenyatta University of Agriculture & Technology, Exparte Cecilia Mwathi Another** Misc. Appl. No. 30 of 2007 in which the following excert from the Supreme Court Practice 1997 Vol. 53/1-14/6 quoted:-

"The remedy of judicial review is concerned with reviewing not the merits of the decision in respect of which the application for judicial review is made, but the decision making process itself. It is important to remember in every case that the purpose of (the remedy of judicial review) is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or of individual judges for that of the authority constituted by law to decide the matters in question." (Emphasis supplied).

By creating new wards, (although some may have been proposed in HC JR. Misc. Civil Appl. No. 116 of 2012), and amending the legal Notice No. 14 of 2012, the learned judges ventured into a political thicket and mathematical quagmire in which they would be at sea for lack of expertise. Boundary delimitation, even of a private parcel of land, is a technical, complex and time-consuming process that a court of law is certainly ill-equipped to undertake. For instance, it is inconceivable how the High Court would have completed the delimitation of all the boundaries in dispute within the 3 months period imposed by **Article 89 (11)** if it was indeed intended that it should be involved in the delimitation process. Similarly, it is not clear to us what considerations the court relied on in reconstituting and re-arranging the wards comprised in the two constituencies. While the court used some proposals by the applicants in H.C. Misc. Civil Appl. No. 116 of 2012, we find no basis at all with regard to re-arrangement of other wards. We hold that it was not even open for the court to rely on the proposals of the applicants in that application as that was the province of the IEBC, that alone was mandated to subject those proposals to the yardstick enumerated under **Article 89 (5).**

The court clearly went against its own holding that it had no jurisdiction to substitute the findings of the IEBC with its own decision.

We reiterate what we said in **Ex – Chief Peter Odoyo Oganda** (supra), that;

"Our reading of Article 89 does not yield or point to authority or jurisdiction of the High Court, while exercising the power of review under that Article, to substitute the decision of the IEBC with its own..... It is good practice intended to foster public confidence and trust to let each organ perform its mandate. But this performance should only be within the limits of the law, good faith and integrity."

We add that the courts in discharging their judicial function must always bear in mind the supremacy of the Constitution and to respect the manner it has distributed functions to various state organs and independent bodies. The function of the High Court is to see that lawful authority vested in these organs and bodies is not abused by unfair treatment. They cannot step outside the bounds of authority prescribed to them by the Constitution or statute because the supremacy of the Constitution is protected by the authority of an independent Judiciary, which acts as the interpreter of the Constitution and all other legislation. But as Lord Brightman warned in the often cited case of **Chief Constable of North Wales Police V. Evans (1982)** 1 WLR 1155 at 1173:-

"If the court were to attempt itself the task entrusted to that authority by the law the court would under the guise of preventing the abuse of power be guilty of itself usurping power."

While we agree with the judges that in interpreting the Constitution, the letter and the spirit of the supreme law must be respected and that the Constitution must be read as an integrated whole, we hold, in addition that it is a fundamental rule of interpretation of all enactments to which all other rules are subordinate that the laws be construed according to the intent of the Parliament which passed the law. And in the case of the Constitution of Kenya, 2010 which was ratified in a referendum, the intention of the people of Kenya over and above the intent of Parliament is of paramount consideration. We entertain no doubt that Parliament or indeed the people of Kenya did not intend to create two institutions for purpose of delimitation of electoral boundaries.

The *"review"* in **Article 89 (10)** of the Constitution, in our view, is judicial review recognized by **Articles 23 (3) (f)** and **47** aforesaid. Perhaps in future, in view of the fact that judicial review is now constitutional relief under the Bill of Rights, and upon enactment of legislation contemplated under Article **47 (3),** the parameters for the grant of the orders of *certiorari*, prohibition and *mandamus* may be expanded. The phrase *"judicial review"* as used in **Article 23 (f)** is a term of art used to describe the process by which the High Court uses the three remedies of *certiorari,* prohibition and *mandamus* to supervise public bodies and inferior tribunals to ensure they do not make decisions or undertake activities which are *ultra vires* their statutory mandate or which are irrational or otherwise illegal in order to prevent those bodies from subjecting citizens to unfair treatment. The mandate of the IEBC under Article **89 (2) (3)** and **(7)** to review electoral boundaries by delimitation of boundaries must be distinguished from *"the review of a decision*" of the IEBC by the High Court through a judicial process.

Before we conclude this judgment, two issues raised in the arguments call for brief determination. The appellants' counsel contended that the High Court misdirected itself in declining to grant the appellants' counsel a chance to highlight their written arguments. Although that was so, we find that no miscarriage of justice or prejudice was occasioned as the High Court was expected to consider all the submissions that were filed whether they were highlighted or not. The second matter has to do with Mr. Kinyanjui's argument that the Notice of Appeal was incompetent for not having been brought as H.C. Misc. Appl. No. 94 of 2012 being the file in which all the judicial review applications were consolidated. While we do not doubt that that ought to have been the position, that alone is not enough for us to reject the appeal. In any case, Mr. Kinyanjui was able to articulate his clients' position in this appeal save for the fact that the record did not include their application in the High Court. This was rectified after an adjournment to enable the applicants file a supplementary record which was duly done. We find no merit in that argument.

We have said enough to show that the High Court exceeded its jurisdiction in interpreting its powers under **Article 89 (10).** Consequently, its orders enumerated in its judgment of 9th July 2012 on pages 1267, paragraph 14 of the Record of Appeal as 14 (a), (b), (c), (d), (e), (f), (g), (h), (i), (j), and (k) are set aside.

We reiterate that the general elections having been held on 4th March 2013, the next cycle of boundaries review shall, all things being equal, take into account the interests of the *"corner tribes"*.

In the sum, this appeal is allowed with each party bearing its own costs.

Dated and delivered at Nairobi this 5th day of July 2013.

M. K. KOOME

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JUDGE OF APPEAL

W. MWERA

…….....

JUDGE OF APPEAL

D.K. MUSINGA

…….....

JUDGE OF APPEAL

W. OUKO

…….....

JUDGE OF APPEAL

J. MOHAMMED

…….....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR